SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE PART 10
Justice

Donald W. Horace

- v -

F.J. Sciame et al
+ 3rd party action

INDEX NO. 120015/03

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: March 28, 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [X] REFERENCE [* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

DONALD W. HORACE,

Plaintiff,

-against-

F.J. SCIAME CONSTRUCTION CO., INC. and HARVARD CLUB OF NEW YORK CITY,

Defendants.

----------x

F.J. SCIAME CONSTRUCTION CO., INC. and HARVARD CLUB OF NEW YORK CITY,

Third-Party Plaintiffs,

-against-

RCC CONCRETE CORP.,

Third-Party Defendant.

----------x

Decision/Order
Index No.: 120015/03
Seq. No. : 003

Present:
Hon. Judith J. Gische
J.S.C.

Index No. 591063/04

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
RCC x-motion [3212] w/PA affirm, exhs	1
Pltff n/m [3212] w/ISS affid, exhs	2
Def n/m w/JS affirm, exhs	3
RCC further affirm in support w/FAP affirm, exhs	4
JS affirm in opp to x-motion to pltff motion	5
Pltff affid in opp to Def motion, further support, w/ISS affid, exhs	6
JS affirm in reply to Pltff motion, further support def x-motion	7
JS affirm in further support vacate note of issue and opp to x-motion	8
Steno record 9/14/06	9

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action by plaintiff brought under sections 200, 240 (1), and 241 (6) of the Labor Law. The defendants have commenced a third party action for indemnification against plaintiff's employer, RCC Concrete Corp. ("RCC") for indemnification. Issue has been joined and plaintiff filed his note of issue on April 23, 2006.

Defendants F.J. Sciame Construction Co., Inc. and the Harvard Club of New York City ("Sciame" and "Harvard Club," sometimes "defendants" or "3rd party plaintiffs") brought a motion to strike the note of issue because of outstanding discovery. That motion was denied on September 14, 2006 for the reasons the court set forth on the record that day. There was already pending a timely motion (April 16, 2006) by plaintiff on his Labor Law §§ 240 (1) and 241 (6) claims, but not on his § 200 (common law negligence) claim. Third party defendant (RCC) had cross moved for summary judgment dismissing the 3rd party complaint against it by the defendants. The RCC cross motion is before the court without opposition.

After defendants' motion to strike the note of issue was denied, defendants cross moved for summary judgment. The motion was filed October 6, 2006, more than 120 days after the note of issue was filed. For the reasons that follow, the court finds that although the cross motion is timely as to the section 240 and 241 claims, it is untimely as to his section 200 claims. Defendants urge the court, however, to overlook the untimeliness of that branch of their motion because their arguments have merit and the section 200 claims are based upon the same accident. Where a cross motion is

untimely, it may nonetheless be considered if it involves the same issues and claims raised in the timely motion because the court may, in the course of deciding the timely motion, search the record and grant summary judgment to the non-moving party if it is entitled to such relief. Filannino v. Triborough Bridge and Tunnel Authority, 2006 N.Y. Slip Op. 08169, NYLJ 11/16/06 (*nor*).

Here, however, plaintiff did not move for summary judgment on his Labor Law § 200 claims and the underpinnings of such a claim are entirely different than his statutory liability claims under Labor Law sections 240 and 241. The court does not have to decide whether defendants were actively negligent in the context of deciding whether they are statutorily liable.

There is no dispute that defendants' cross motion on the section 200 claims is untimely. Coneo v. Washington Heights Hellenic Orthodox Church, Inc., 33 A.D.3d 484 (1st Dept. 2006). The touchstone case of Brill v. City of New York, [2 NY3d 648 (2004)] and other cases that have followed [Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725 (2004); Perini v. City of New York, 16 AD3d 37 (1st Dept 2005); Brown v. City of New York, 6 Misc3d 1017(a) (Sup Ct 2005)] have made it perfectly clear that the purported merit of an untimely summary judgment motion cannot be considered to constitute "good cause" for the late filing of the motion. Therefore, defendants' motion, insofar as it seeks summary judgment against plaintiff on his section 200 claim, will not be considered, regardless of whether their arguments have or lack merit.

These motions are otherwise consolidated for consideration and decision in a single decision and order as follows:

Background

Plaintiff Donald W. Horace ("plaintiff") was employed with RCC as a carpenter foreman on September 16, 2002, the date of his accident. The Harvard Club owns the premises where plaintiff was working. It had a written construction contract with Sciame dated April 30, 2002. According to that agreement, Sciame was the construction manager of the project. RCC was a subcontractor, hired to do fireproofing work on the project.

Plaintiff contends that his injuries were proximately by defendants' violations of Labor Law §§ 240 (1) and 241 (6) and that the Harvard Club and Sciame are each liable as owner and contractor of the project.

In support of both these claims, plaintiff alleges that he was provided with a wooden "A" frame ladder without any rubber feet or grips and that while he was attempting to lift up and install form work to be later used to pour concrete stairs, the ladder slipped, causing him to fall six feet to the ground. He offers the EBT testimony of David Lee, an owner of RCC ("David") who testified that there were no scaffolds available at the Harvard Club for plaintiff to use in connection with this task.

Plaintiff has testified that this kind of work was always done in teams of two or three workers. One person would climb the ladder while the other person(s) held the ladder steady. He testified that he had never before installed form work by himself, but that day, Ricky Lee ("Ricky"), the superintendent of the project, and Giuseppe Sestito, the labor foreman, told him that the other carpenters were busy and that he had to work by himself. Plaintiff testified that when he complained to Ricky and Mr. Sestito about

having to do the job alone, he was told he had to do it anyway because RCC was losing money on this project and it had to be finished "today."

Plaintiff testified that he went and got a wooden A-frame ladder that was ten feet tall. He then proceeded to place it in the area where he would be working which was in a stairwell between ascending and descending stairs. He propped or leaned the ladder in its closed position against a wall that was only 6 inches wide. Plaintiff testified that the area was very small (only 6 feet by 6 feet) and that he could not open the ladder which by itself was a foot wide at the top had it been opened. Plaintiff went up and down the ladder 4 or 5 times without any incident. The last time he climbed up, however, the ladder shifted and twisted to the left. The ladder did not fall to the ground, but landed on an adjacent wall, still in its upright position. Plaintiff fell off or was thrown to the staircase below. There are no other witnesses to the accident. Neither Ricky nor Mr. Sesisto were deposed by any party to this case, in any event their deposition testimony is not before the court.

Plaintiff argues that he was sent to do a dangerous job with a ladder inadequate for the task. He argues that the failure to have rubber feet or grips on the ladder was a proximate cause of his injuries and a violation of the industrial code. He contends this is a basis upon which to impose liability on the Harvard Club and Sciame (respectively the owner and contractor) under Labor Law §§ 240 and 241 (6). He contends, without admitting any negligence on his part, that even if he contributed to his accident through his own negligence, this would not defeat his motion for summary judgment on his section 240 claim because contributory negligence is not a defense available to either

the owner or contractor under either that section of the Labor Law.

In support of his section 241 (6) claims, plaintiff contends several sections of the Industrial Code were violated, including subsections of 12 NYCRR 23-1.21, containing ladder requirements. 12 NYCRR 23-1.21 (b) (3) requires that "all ladders should be maintained in good condition . . ." 12 NYCRR 23-1.21 (e) (3) also pertains to ladders, and stepladders in particular. In his complaint he also cites violations of 12 NYCRR 23-2.5 - "Protection of persons in shafts" and 12 NYCRR 23-2.7 "Stairway requirements during the construction of buildings." They are not, however, the basis for plaintiff's summary judgment motion, but are relied upon by the defendants in their cross motion.

In support of their cross motion, the defendants offer the deposition testimony of Mr. Gagliardi, an assistant field supervisor at the time of the accident. Defendants also rely upon plaintiff's own deposition testimony, and the testimony by David of behalf of RCC, as well as various other documents. Based upon this record, defendants argue that they are entitled to summary judgment dismissing the complaint, or in the alternative, the denial of plaintiff's motion for summary judgment against them.

Defendants contend that plaintiff was a seasoned foreman who knew better than to lean a ladder in the manner he did. Thus, they contend that because he chose to use the ladder in its closed position, he is the sole proximate cause of his injuries, which are a complete defense under Labor Law § 240 (1). In defense of the section 241 (6) claims against them, defendants contend that plaintiff's accident did not occur because of the absence or inadequacy of any safety device provided or available at the site, but because plaintiff used the ladder improperly. Defendants further contend that the

industrial code provisions plaintiff relies upon are wholly inapplicable and therefore not the predicate bases for his claims.

RCC, has cross moved for summary judgment dismissing the 3rd party complaint, consisting of a negligence cause of action and actions for contribution (2nd cause of action) and contractual indemnification (3rd cause of action). Although no one opposes the motion, RCC still has the burden of proving its case because summary judgment is a resolution on the merits. Vinci v. Northside Partnership, 250 AD2d 965 (3rd Dept 1998). RCC also opposes plaintiff's motion for summary judgment.

In opposition to plaintiff's summary judgment motion, RCC contends that Mr. Horace was the sole proximate cause of his injuries and that they resulted because of his improper use of the ladder. Like defendants, RCC contends that with his extensive experience as a foreman, and safety training, he should have realized the way he was using the ladder was dangerous.

Regardless of whether the plaintiff's complaint is dismissed, RCC argues that there is no legal basis for defendants' 2nd and 3rd causes of action against it. RCC contends that Mr. Horace did not sustain a "grave injury" within the meaning of the Workers Compensation Law section 11, therefore defendants cannot, as a matter of law, be held liable for contribution for damages as result of his injuries which occurred within the scope of his employment.

Relying upon the deposition testimony of David Lee ("David"), one of its owners, RCC contends that there is no written contract between itself and Sciame for

indemnification. Thus, RCC contends that in the absence of a grave injury or a contractual agreement, the 3rd party complaint fails to state a cause of action and must be dismissed.

Discussion

The proponent of a motion for summary judgment has the initial burden of tendering sufficient evidence to eliminate any material issues of fact from the case by evidentiary proof in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden will then shift to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, *supra* 560. The party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. Id. at 562.

Labor Law § 240 (1)

Labor Law § 240(1) imposes a non-delegable duty upon the owner and contractor to supply necessary security devices for workers at an elevation, to protect them from falling. Bland v. Manocherian, 66 N.Y.2d 452, 458-459 (1985). An owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work. Ross v. Curtis-Palmer

Hydro-Elec. Co., 81 NY2d 494, 500 (1993). Therefore, a violation of this duty results in absolute liability where the violation was the proximate cause of the accident. Meade v. Rock-McGraw, Inc., 307 A.D.2d 156 (1st Dept. 2003).

Where a ladder is offered as a work-site safety device, it must provide the proper protection; the failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1). Schultze v. 585 W. 214th St. Owners Corp., 228 A.D.2d 381 (1st Dept. 1996). A plaintiff, in order to be awarded partial summary judgment on a section 240 (1) claim , must demonstrate, by admissible evidence, that the statute was violated and that such violation was the proximate cause of his or her injuries. Kyle v. City of New York, 268 A.D.2d 192 (1st Dept. 2000) *lv to appeal den* Kyle v. City of New York, 97 N.Y.2d 608 (2002).

The failure of a ladder to have rubber feet, and the absence of "proper protection" establishes plaintiff's prima facie case under Labor Law § 240 (1); Szymanski v. Nabisco, Inc., 256 AD2d 1154 (4th dept. 1998). Defendants have not made a showing, sufficient to defeat summary judgment, that plaintiff's own conduct was the sole proximate cause of his injury. Meade v. Rock-McGraw, Inc., 307 A.D.2d 156 (1st Dept. 2003). Nor have defendants come forward with any evidence that plaintiff had any other devices available to him with which to do his job more safely. Robinson v. East Medical Center, LP, 6 N.Y.3d 550 (2006). Plaintiff's testimony, that he was instructed to proceed with his job, without the proper safe guards, and despite having had human assistance on prior occasions to keep the ladder steady, is uncontroverted. Miraglia v. H & L Holding Corp., 36 A.D.3d 456 (1st Dept.,2007);

Wasilewski v. Museum of Modern Art, 260 A.D.2d 271 (1st Dept 1999); *Compare*: Agramonte v. NYU, 2007 NY Slip Op 30011(U) (Sup Ct, NY County 3/1/2007) (*and cases cited therein*) [worker had other, safer options available to him, but ignored them]. Any other arguments by defendants attacking plaintiff's credibility does not frame any factual disputes for trial. There is no deposition testimony or sworn affidavit that contradicts plaintiff's description of how his accident happened.

Based upon the foregoing, plaintiff has proved his entitlement to summary judgment under Labor Law section 240 (1). He has established that defendants breached their statutory duty under section 240 (1) to provide him with adequate safety devices, and that this breach was a proximate cause of his injuries. Although defendants have set forth triable factual issues about whether plaintiff was himself negligence, thereby contributing to his injuries, this does not defeat plaintiff's motion because they did not prove he was the sole proximate cause of the accident. Blake v. Neighborhood Housing Services of New York City, Inc., 1 NY3d 280 (2003).

Labor Law § 241(6) claim

Labor Law § 241(6) requires owners and general contractors "to provide reasonable and adequate protection and safety to the persons employed therein . . ." In contrast to § 240 (1), the culpable conduct of the injured person is relevant, and the comparative fault of the plaintiff should be considered. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 512 (1991).

The Industrial Code sections cited by plaintiff as having been violated are

specific enough to establish liability, however Sections 23-2.5 and 23-2.7 are wholly inapplicable to the facts of this case. 12 NYCRR 23-2.5 applies to injuries that occur in a shaft. Plaintiff was not injured in a shaft, but within a stairwell area. 12 NYCRR 23-2.7 applies to injuries that occur due to the absence of temporary stairs. Ramputi v. Ryder Const. Co. 12 A.D.3d 260 (1st dept 2004). While plaintiff may have fallen onto the descending stairs, his accident was not due to a violation of this code section. Neither of these code sections support his Labor Law § 241 (6) claims and cannot form the basis therefore. Therefore, to the extent that his claims are based upon these code sections, they are denied and defendants' cross motion for summary judgment is granted.

12 NYCRR § 23-1.21 (b) (3) and (b) (3) (iv), which plaintiff also relies upon, are however clearly applicable to the facts of this case. 23-1.21 (b) (3) requires that all ladders be maintained in "good condition;" § 23-1.21 (b) (3) (iv) requires that a ladder should not be employed if defective. 12 NYCRR § 1.21 (e) (3) also appears to be applicable to the facts of this case. It requires that stepladders "be used only on firm, level footings" and that "such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means."

Although defendants argue that these code sections do not apply to wooden ladders like the one involved in plaintiff's accident. They have not proved this as a matter of law. On the other hand, since plaintiff's contributory negligence is a defense available to defendants for a claim under Labor Law § 241 (6), there are triable factual

disputes about whether plaintiff improperly used the ladder. Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343 (1998). Therefore, neither party is entitled to summary judgment on plaintiff's Labor Law § 241 (6) claims and both motions are denied.

The 3rd party complaint

Although on default, RCC still has the burden of proving its entitlement to summary judgment dismissing the complaint. Vinci v. Northside Partnership, 250 AD2d 965 (3rd Dept 1998). RCC has proved that plaintiff's injuries, which include disc herniations, bulges and a sprained ankle, are not, by definition "grave injuries" within the meaning of section 11 of the Workers Compensation Law. McCoy v. Queens Hydraulic Co., Inc., 286 AD2d 425 (2nd Dept 2001). In the absence of a grave injury, an employer is not liable for contribution or indemnity to any third person, unless there is a written agreement to indemnify. Rodrigues v. N&S Building Contractors, Inc., 5 NY3d 427 (2005). RCC contends there is no written indemnification agreement, only purchase orders. The most complete of the three such purchase orders provided (dated October 21, 2002), not only post-dates plaintiff's accident, it does not contain any indemnity provision. David Lee testified at his EBT as to how Sciame and RCC conducted business, and established it was routine for RCC to be called to a job on an emergency basis, and without any formal contract.

Based upon the foregoing, and taking into consideration that RCC's motion is unopposed, RCC has proved it is entitled to summary judgment dismissing the 3rd party complaint against it.

Conclusion

Plaintiff's cross motion for summary judgment on its Labor Law § 240 (1) claim is granted and defendants' corresponding motion is denied. Both cross motions (e.g. by plaintiff and defendants) for summary judgment on plaintiff's Labor Law § 241 (6) are denied as there are triable factual disputes. Defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 claims has not been considered (and is denied) because it is untimely. RCC's motion for summary judgment which is before the court without opposition is granted in its entirety and the 3rd party complaint is dismissed. The clerk shall enter judgment in favor of RCC against the Harvard Club and Sciame on the third party action.

The remaining issues in this action, this case is ready for trial. Plaintiff shall serve a copy of this decision and order upon the Trial Support Office so that it may be scheduled for trial.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 28, 2007

So Ordered

Hon. Judith J. Gische, J.S.C.